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QUESTION OF THE REALIZATION IN ALL COUNTRIES OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS CONTAINED IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND IN THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, AND STUDY OF SPECIAL PROBLEMS WHICH THE DEVELOPING COUNTRIES FACE IN THEIR EFFORTS TO ACHIEVE THESE HUMAN RIGHTS, INCLUDING: PROBLEMS RELATED TO THE RIGHT TO ENJOY AN ADEQUATE STANDARD OF LIVING; FOREIGN DEBT, ECONOMIC ADJUSTMENT POLICIES AND THEIR EFFECTS ON THE FULL ENJOYMENT OF HUMAN RIGHTS AND, IN PARTICULAR, ON THE IMPLEMENTATION OF THE DECLARATION ON THE RIGHT TO DEVELOPMENT

The right of everyone to own property alone as well as in association with others

Completed final report submitted by Mr. Luis Valencia Rodríguez, independent expert

Addendum

Introduction

1. The Commission on Human Rights, at its forty-ninth session, taking note of the report of the independent expert, adopted resolution 1993/21 of 4 March 1993 in which it, inter alia, decided to renew the mandate of the independent expert for one year so that he might complete his report using the observations and comments submitted by governments and intergovernmental and non-governmental organizations which could not be included owing to the time when they were received.

2. After the publication of that report (E/CN.4/1993/15) replies were received from the Governments of Argentina, Cameroon, Greece and Iraq. Those replies were elucidated in the completed final report submitted by the independent expert (E/CN.4/1994/19).

3. After this completed final report had been submitted for reproduction, the Secretariat received replies from the Governments of the Netherlands and Thailand. Those replies are summarized below.

THE NETHERLANDS

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[23 December 1993]

Introduction

The Netherlands Government welcomes the work of the independent expert and wishes to focus on two major elements in its reply to the questionnaire:

(a) On the protection of the right to property and the developments in that respect;

(b) The importance of the issue for social and economic development and for justice.

According to doctrine in the Netherlands property can be considered as one of the central concepts in the Netherlands legal order. Property is of essential significance for society since property and contract jointly form the basis for exchange and trade, on which the market economy is built.

Property is protected in the Netherlands Constitution in the part of the Constitution devoted to fundamental rights. However, it may be noted that the formulation is limited to an expropriation clause: article 14.1: "expropriation may only take place in the general interest and subject to prior assured compensation and both subject to the conditions provided for by or on the basis of the law." It may be pointed out here that while the Netherlands Constitutions of 1815 and 1840 did contain a guarantee clause ("Every citizen is entitled to the peaceful possession and enjoyments of his property ...", art. 162, Const. of 1815), since 1848 only an expropriation clause has been included in the Constitution. Article 14 of the Constitution elaborates on the way in which expropriation is limited.

The formulation in the Netherlands Constitution reflects the Government's opinion that the right to property is subject to more limitations and qualifications than other justiciable rights. The formulation implies a delicate balance between the need to protect on one hand private property and on the other side the societal interest.

The protection of property is further subject to numerous legal provisions. To be mentioned in particular are:

- In civil law: Book 5, titles 1, 2 and 3 of the New Civil Code which are devoted to property; the real property registration act; the Rent Act, the Patent Act, the Copyright Act;

- In administrative law: the expropriation Act, the Living Accommodation Act, the Monuments Act, the Waterboard Act, the Nature Conservation Act, Environment Act;

- In penal law: Penal articles 33 and foll. regarding confiscation.

I. CONCEPTUAL ISSUES

Comments regarding paragraph 54 (a) of the preliminary report and paragraphs 19-30 of the final report

It may be noted that, internationally, the protection of property is often seen as a civil/political right given its place in the Universal Declaration of Human Rights (art. 17) after the right to found a family and before the right to freedom of thought, conscience and religion. (See also the International Convention on the Elimination of All Forms of Discrimination, art. 5, where the right to property is defined as a civil right).

However, property ownership, especially when seen as including also the property of one's own labour and intellectual property, clearly relates to a number of economic, social and cultural rights, such as labour rights, rights to housing, etc. The case law (around 30 cases before the Court) which has been created by the European Commission and Court of Human Rights also reflects these pluriform relationships in which the protection and the societal interests are delicately balanced. It reflects the concept of the social market economy as has emerged after the Second World War in western Europe and which is often defined as the "social State". It would be appreciated if the independent expert would elaborate on this facet.

As indicated before, the right to property should not be seen, according to substantial doctrine in the Netherlands, as an isolated right on its own, but also as an efficient instrument in promoting socio-economic well-being. As such international human rights instruments provide a basis for such perception since in several human rights instruments some of the goals to which property is instrumental have been formulated:

(a) To meet essential needs of decent living and maintain the dignity of the individual and of the home (American Declaration on the Rights and Duties of Man of 1948);

(b) Security (no arbitrary deprivation, art. 17, Universal Declaration on the Rights and Duties of Man);

(c) Non-discrimination (Discrimination Convention, art. 5 (d) (v). Convention on the Elimination of All Forms of Discrimination against Women, art. 16 (1) (b);

(d) Subordinate to the interest of society (American Convention on Human Rights);

(e) Non-abuse of property (American Convention on Human Rights).

Developments in the last century have seen at some stages a certain degree of erosion of the private element in favour of the societal interest element. Moreover, the protection of property has been the subject of much international discussion between East and West. It would be appreciated if the independent expert could elaborate in his report on the above-mentioned issues.

II. PROPERTY AND DEVELOPMENT

Comments regarding paragraph 54 (b) of the preliminary report and paragraphs 123-178 of the final report

The various forms of property ownership should contribute to ensuring the effective and efficient development and utilization of human resources through the establishment of sound bases for political, economic and social justice. The Netherlands can be considered a highly developed country in the technical sense. Its recognition of the relevance of property for efficient use of resources can be seen in its numerous detailed legal provisions with regard to property.

In less developed countries land and ownership are much more important since relatively few long-term sources of security for decent living conditions exist besides property. Especially in countries in which agriculture is still a primary source of income, property protection (of land) is seen as crucial to facilitate and secure individual investment in development. In developing countries efficiency can also be a substantial reason for protecting private property.

The experience of the Netherlands in development cooperation seems to show that effective protection of private property can also benefit the poor and possibly even the poorest. However, certain conditions have to be met:

(a) A proper and effective system of appeal whereby property cases can be effectively brought before an independent judge;

(b) Proper protection against abuse by property owners. This implies proper protection of those who are tenants or farm labourers, etc.

In the Netherlands several bilateral cooperation projects have failed or encountered serious difficulties because of the absence of adequate property protection or the prevention of abuse.

III. LEGAL PROTECTION AND PROMOTION

Comments regarding paragraph 54 (c) of the preliminary report and paragraphs 179-247 of the final report

Property is protected in the Netherlands Constitution as well as in article 1 of the first protocol to the European Convention of Human Rights. In addition, property protection is regulated in the greatest detail in the new Civil Code as well as in numerous other Acts. Expropriation is carefully regulated in the relevant laws. Basically, normal expropriation procedures involve two phases: (a) the administrative phase, whereby the property is identified and the need for expropriation is established; and (b) the judicial phase, whereby expropriation is approved and the compensation is established by the regular independent courts.

The Netherlands Government has in practice taken a number of legislative measures with the goal of fostering the phenomenon of private property and the enjoyment of possessions. Most notable and effective in practice are substantial tax-deduction possibilities for those who take mortgage(s) (hypotheque) to acquire real estate.

IV. MANY FORMS OF PROPERTY OWNERSHIP

Comments regarding paragraph 55 of the preliminary report and paragraphs 248-270 of the final report

It is also recognized in the Netherlands that the adequate functioning of a modern pluriform economy, and for that matter of a pluriform democracy, require a certain pluriformity of types of ownership. Provided that a number of basic requirements are taken into account, the type of protection is related to the function of the property.

The degree of protection for property which has the function to secure basic housing or basic income needs of individuals can be of a different order than the protection of industrial property.

It also appears from various documents on the right to property that there is a relationship between societal needs, environmental needs and legal systems on one hand and the type of legal arrangements made for property. Such protection arrangements can differ, moreover, from country to country. They might lead to more detailed legal arrangements in a certain field in one country, while that same field is not subject to any regulation in other countries.

Typical examples in the Netherlands are:

(a) Given its continuous fight against water - both against the sea and against inland water - it is not surprising that there are detailed arrangements on the relationship between property and issues dealing with water. Between 1815 and 1983 a provision was even made in the Constitution which stipulated special expropriation powers in case of floods. Furthermore, there are extensive legal arrangements as to, e.g. the consequences of erosion of land due to rivers; the property of water and streams; ownership of land emerging from rivers or the sea; the powers of water boards as regards possible limitations on the enjoyment of property and even as to the eviction of owners in order to facilitate the protection against the water in time of emergency. It goes without saying that only a few (if any) countries have similarly detailed arrangements which are properly reflected in law;

(b) Similarly, for urban development reasons much emphasis has been laid in the past on the development of long lease arrangements (droit de jouissance or emphyteusis).

On the basis of our experience in developing countries there is felt to be a need for simple, clear systems protecting property rights, e.g. in rural areas with traditional legal systems or in slum areas with unclear ownership rights. Such protection should always include the possibility of measures against abuse of property and direct and effective access for owners to the judiciary.

In developing countries legal procedures ensuring effective enjoyment often are deficient. It would be appreciated if the expert could devote attention to the question of the need for effective protection of property by the judiciary.

V. NON-DISCRIMINATION

Comments regarding paragraph 55 (h) of the preliminary report and paragraphs 344-396 of the final report

Non-discrimination is the subject of continuous concern of the Netherlands Government which has ratified both the Discrimination and the Women's conventions. Article 1 of the Netherlands Constitution stipulates: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the ground of religion, belief, political opinion, race, sex or any other grounds whatsoever shall not be permitted.

(i) A distinction between nationals and foreigners in relation to the enjoyment of rights can normally not be made in view of article 1;

(ii) No distinction between men and women as regards to property rights is allowed;

(iii) No indigenous populations exist in the Netherlands.

VI. RESTRICTIONS AND LIMITATIONS

Comments regarding paragraph 56 of the preliminary report and paragraphs 397-476 of the final report

Property is not an absolute right. Its use is subject to a wide margin of limitations. The expert focuses in paragraph 56 on the limitations which are enforced by the State. According to Netherlands doctrine property enjoyment is also limited by the rights of others. Especially, abuse of property is not allowed. The Civil Code even enunciates possible forms of abuse of property rights. It would be appreciated if such questions, espcially if not related to express limitations in the law by the State, are researched by the expert.

In international human rights law the protection against abuse can also be found in standards protecting against discrimination, against exploitation, against arbitrary deprivation of someone else's standard of living.

VII. RIGHT TO HOUSING

Adequate housing is a subject of interest which might lead to conflict with the right to own property. In the Netherlands the provision of adequate housing has been a government priority since the Second World War. Substantial legislation has been enacted and executive measures have been taken to provide adequate housing. At the same time, the need to provide adequate housing and the need to protect the environment in an overpopulated country like the Netherlands has led to regular limitations of the rights of others to enjoy their property. The Rent-Act in the Netherlands specifically intends to strike a balance between those who enjoy housing rights and those who own property. The system of environmental planning limits the possibilities of property owners to build houses on their real estate. At the same time large-scale subsidies are provided for those who buy or rent houses and cannot afford to.

THAILAND

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[29 November 1993]

The Government of Thailand sent the observations made by the Office of the Attorney-General of Thailand who stated that Thailand protected and recognized the right to own property along the same standards applied by any other country governed by a democratic system. The protection of the right to own property in Thailand is guaranteed under the Thai Constitution and elaborated further in relevant provisions of Thai laws, including sections 1335-1355 and 1356-1366 of the Civil and Commercial Code, sections 334-365 of the Criminal Code or Penal Code and sections 3, 4 and 10 of the Land Law Code of Thailand.*

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* The texts of the above-mentioned sections of the relevant codes are available for consultation in the files of the Secretariat.